

MEMORANDUM OF LAW

DATE: March 7, 1994

TO: Ernest Freeman, Planning Director

FROM: City Attorney

SUBJECT: Employee Housing Act

You have directed the following questions to our office concerning the recent amendments to the Employee Housing Act ("the Polanco Bill") and inclusive provisions codified in California Health and Safety Code sections 17021.5 and 17021.6.F Hereinafter, all references to code sections shall be to the California Health and Safety Code, unless otherwise noted. This memorandum responds to those questions based on our interpretation of the appropriate code sections.

BACKGROUND

Pursuant to Section 17030(a), every person who operates an employee housing facility in this state is required to obtain an annual operating permit, unless statutorily exempt from the requirement. "Employee Housing" is defined in Section 17008 to include on-site living accommodations maintained in connection with any work or place where work is being performed, or off-site housing accommodations used by five or more agricultural employees located in any rural area, as defined by Section 50101.

Generally, the owner of employee housing who has obtained a state permit pursuant to Section 17030(a) is still subject to local planning requirements. 25 C.C.R. Section 631(c). However, if the facility meets criteria set forth in Sections 17021.5 or 17021.6, the permittee may qualify for limited local zoning override benefits. The questions you raise all relate to the applicability or interpretation of the local zoning override provisions.

Question No. 1: Does Section 17021.5 apply to employee housing of six persons or fewer, with or without their immediate families?

Answer: Section 17021.5 does not mention taking family members into account when considering the total number of permissible residents. Section 17021.6, which applies to employee housing in rural areas, specifically does state that

family members are not to be included in the maximum number of residents. Rules of statutory construction provide inclusions or omissions by the Legislature are intended to have meaning. Because family members are clearly omitted from Section 17021.5 and, at the same time expressly included in Section 17021.6, it is reasonable to assume the Legislature intended for an employee housing facility to qualify for the local zoning override benefits contained in Section 17021.5 only when the facility accommodates six or fewer persons.

Question No. 2: Does Section 17021.5 apply only to areas designated for residential use or to other land use designations as well, particularly agricultural?

Answer: Section 17021.5 contains no express provision giving guidance on this issue. However, after analyzing the legislative history, senior staff counsel for the State Department of Housing and Community Development, Ronald Javor, has opined that the legislative intent in adopting Section 17021.5 was to address single family homes and their conventional impact in single family neighborhoods. We think a liberal but reasonable interpretation of Section 17021.5 is that it should be applicable to any facility which qualifies as employee housing and could otherwise lawfully be used as a single family dwelling. This would include all single family dwellings in single family zones, all single family dwellings located in other zones where single family dwellings are permitted and any home where the owner has a nonconforming right to maintain the structure as a single family dwelling, irrespective of the underlying zoning designation.

Question No. 3: Can housing for six or fewer employees be allowed in just one or a few residential zones (presumably large lot, very low density) or must it be allowed in all residential zones?

Answer: As stated above in our answer to Question No. 2, we do not believe that application of Section 17021.5 is triggered by the underlying zone designation. Rather, to enjoy special protection under Section 17021.5, the facility must be "employee housing," as defined in Section 17008, and the facility must otherwise qualify for lawful use as a single family dwelling.

Question No. 4: Planning Department staff interprets Section 17021.6 to apply to employee housing of 12 or fewer persons without their immediate families in areas zoned for agriculture only. Do you agree with this interpretation?

Answer: The provisions of Section 17021.6 are triggered only if a facility is located in an agricultural zone and only if

the facility accommodates twelve or fewer employees, plus their family. If your interpretation is that family members are not to be included in the total of 12 allowable employees, this would be a correct interpretation.

Question No. 5: Does Section 17021.6 permit the City to allow employee housing with families, regulated through a conditional use permit?

Answer: If a facility qualifies for protection under Section 17021.6(b), a conditional use permit ("CUP") cannot be required that is not required by any other agricultural activity in the same zone. The City can require a CUP if the use of the facility is not permitted as a matter of right in the agricultural zone and the facility houses more than 12 agricultural employees or it is a mixed use facility housing agricultural employees and other persons not related by blood to the agricultural employees.

Question No. 6: To what extent do Sections 17021.5 and 17021.6 permit the City to regulate the design of employee housing through such means as maximum density, floor area ratio, setbacks, minimum and maximum lot size, minimum parking, etc.?

Answer: The purpose of the Polanco Bill was to override local zoning regulations which would have the affect of discouraging or preventing local approval of employee housing facilities. However, it was not the intent of the Legislature to completely override all land use regulations affecting these facilities. The City still retains authority to regulate under our current land use regulations to the extent that these facilities are not singled out for special treatment. The Legislature quite clearly stated that any single family dwelling which houses employees and qualifies for protection under Section 17021.5 cannot be regulated differently from all other single family dwellings in the City.

Under Section 17021.6, a qualifying employee housing facility must be treated as an agricultural use and thus permitted as a matter of right in agricultural zones. Thus, under this provision, the City cannot require a CUP, zoning variance or any other special permits or fees for a qualified agricultural employee housing facility, unless it would also be required for other agricultural uses in the zone.

Question No 7: Does Section 17021.5 permit the City to confine employee housing accommodations to the primary housing structure or must the City permit separate structures to accommodate employees?

Answer: Again, this section does not strip the City of all regulatory authority. Rather, employee housing which qualifies

under Section 17021.5 is subject to the same regulations as any other lawfully maintained single family dwelling which is not used to house employees. Thus, under existing regulations, if the lot could not be developed with a second unit, a granny flat or guest quarters, nothing about this law overrides those provisions of our Municipal Code precluding that development. On the other hand, if the regulations permit such development by right or through a discretionary permit process, the owner should be allowed to fully develop his or her property subject to the same restrictions as owners of other single family dwellings.

Question No. 8: It is the Planning Department's understanding that no part of the City of San Diego qualifies as a "rural area," as referred to in Section 17008 of the Health and Safety Code and as defined in Section 50101.

Answer: The term "employee housing" is defined two different ways in Section 17008. In Section 17008(a), employee housing is defined as on-site living accommodations maintained in connection with any work or place where work is being performed. Alternatively, under Section 17008(b), a facility may qualify as employee housing if located in a "rural area," as defined in Section 50101. The areas in the State which qualify as "rural" under Section 50101 are set forth in reports and maps published by the State Department of Housing and Community Development. If what you say is correct, that no part of the City of San Diego qualifies as a "rural area" under Section 50101, then for purposes of determining applicability of Sections 17021.5 and 17021.6, you should focus on whether the facility at issue qualifies as "employee housing" under the alternative definition set forth in Section 17008(a).

Please call me if you need further clarification of our analysis or if you have additional questions.

JOHN W. WITT, City Attorney

By

Richard A. Duvernay

Deputy City Attorney

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